

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

FILED BY CLERK

FEB -7 2008

COURT OF APPEALS  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2007-0147-PR
	)	DEPARTMENT B
v.	)	
	)	<u>MEMORANDUM DECISION</u>
THUC TRI NGUYEN,	)	Not for Publication
	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
	)	

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PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20013194

Honorable Christopher C. Browning, Judge

REVIEW GRANTED; RELIEF DENIED

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Terry Goddard, Arizona Attorney General  
By Randall M. Howe and John R. Evans

Tucson  
Attorneys for Respondent

Law Office of Thomas Jacobs  
By Thomas F. Jacobs

Tucson  
Attorney for Petitioner

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E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Thuc Tri Nguyen was charged with multiple counts of illegally conducting an enterprise and securities fraud. Pursuant to a plea agreement, he was convicted of one count of illegally conducting an enterprise and two counts of selling an unregistered security. The court sentenced Nguyen to presumptive, consecutive, 2.5-year

prison terms on the two counts of selling an unregistered security and placed him on five years' probation on count one. In this petition for review of the denial of post-conviction relief, which he sought pursuant to Rule 32, Ariz. R. Crim. P., Nguyen contends the trial court erred by denying relief on his claims that (1) the order of restitution violated the federal prohibitions against double jeopardy to the extent he may be required to pay restitution to the same victims who were victims in convictions for the same offenses obtained in Utah, and (2) the trial court erred in not granting him a restitution hearing or a hearing on his claim that trial counsel had been ineffective in assuring him he would have the opportunity to challenge the amount of restitution and in failing to challenge the amount of restitution when it was ordered.

¶2 We will not disturb a trial court's order denying post-conviction relief summarily, that is, without an evidentiary hearing, unless we find the court abused its discretion. *State v. Vallejo*, 215 Ariz. 193, ¶ 2, 158 P.3d 916, 917 (App. 2007). "A court abuses its discretion if a decision is manifestly unreasonable or is based on untenable grounds[.]" *Schwartz v. Superior Ct.*, 186 Ariz. 617, 619, 925 P.2d 1068, 1070 (App. 1996), or if the court makes an error of law, *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983).

¶3 The plea agreement provided that Nguyen would pay restitution in an amount "not to exceed \$24,944,788.28" to the victims listed in an exhibit attached to the plea agreement. Nguyen signed the plea agreement, verifying he agreed to all of its terms, after having been assisted by counsel. Counsel signed the plea agreement as well, verifying that

she had discussed the plea agreement with Nguyen and believed he had understood its terms and the constitutional rights he was waiving by entering into the agreement. At the change-of-plea hearing, the court reviewed the plea agreement with Nguyen and, based on the colloquy between them, ascertained that Nguyen understood the charges to which he was pleading guilty; that he had reviewed the plea agreement with his attorney, who, Nguyen commented, “is really good”; that he understood the constitutional rights he was waiving; and that he agreed with the stipulated factual basis for the plea. The court specifically noted that Nguyen was agreeing that he might be ordered to pay nearly \$25,000,000 in restitution.

¶4 In its sentencing minute entry, the trial court ordered Nguyen to pay restitution in the amount of \$22,279,412.45, based on an exhibit prepared by the probation department that identified the victims and specified the amount of the loss each had sustained. The court further noted Nguyen had already paid \$484,860. At the sentencing hearing, Nguyen did not object as the court again referred to the agreement, nor did he tell the court that his attorney had made any promises or given him any assurances with respect to restitution that differed from what Nguyen had agreed to at the change-of-plea proceeding and in the plea agreement itself. Urging the court to consider placing Nguyen on probation, defense counsel noted that Nguyen had also been convicted of offenses in Utah for conduct arising out of the same enterprise, noting Nguyen was “fully committed to paying these victims back, and his remorse is genuine.” Counsel added, “The restitution is certainly a great deal of money, over \$22 million, and he is being held fully responsible for that. And he is going to do his best to pay for that.” Before sentencing Nguyen, the court confirmed the parties’ understanding

that the court was to consider and incorporate the document prepared by the probation department, which provided for restitution that totaled \$22,279,412.45. Again there was no objection, except counsel's clarification that Nguyen had already paid close to half a million dollars. Nor did Nguyen object or contradict counsel when Nguyen addressed the court, professed remorse, and assured the court he was determined to pay the victims for their losses. The court then imposed the sentences and ordered Nguyen to pay restitution in the amount previously stated, specifying that Nguyen's obligation was to "be joint and several if any other convictions in this case do result."

¶5 In its minute entry denying post-conviction relief, the trial court addressed the issues Nguyen had raised in his petition, clearly identifying the claims and resolving them correctly. No purpose would be served by rehashing the particulars of the court's order, which we adopt. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). On review, Nguyen has not persuaded us the trial court abused its discretion. Contrary to his contention, the trial court addressed all claims that Nguyen had raised. In addition, at the time of sentencing, the court had carefully considered all of the relevant circumstances, paying particular attention to restitution and basing it on the exhibit prepared by the probation department and on the plea agreement. We reject Nguyen's argument that the court inadequately resolved his claim that the victims may receive double compensation; the court made clear that Nguyen would be entitled to an offset of any amounts owed in the event that the victims were made whole. That is sufficient protection against the possibility

that any victim might be doubly compensated. But, even were that to occur, Nguyen would not be precluded from seeking relief at that point.

¶6 Nor did the court err by denying Nguyen an evidentiary hearing on his claim of ineffective assistance of counsel. The record clearly establishes that Nguyen knew he could be ordered to pay nearly \$25,000,000 in restitution. At the change-of-plea hearing, he denied that any promises had been made to him, conceded he had consulted counsel on all terms of the agreement, and stated he was satisfied with the services counsel had rendered. The trial court was entitled to rely on Nguyen’s responses and assurances. Nguyen failed to establish a colorable claim that counsel’s performance had been deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985); *see also Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (defendant must establish counsel’s performance in connection with entry of plea was deficient and “that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial”).

¶7 We grant the petition for review but deny relief.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge